IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHOICE LANDS, LLC, A WEST VIRGINIA LIMITED LIABILITY COMPANY,

APPELLANT/PLAINTIFF BELOW,

V. CASE NO.: 33878

NONDUS TASSEN, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF BILLY L. TASSEN, AND KENNETH JONES AND JOYCE JONES,

APPELLEES/DEFENDANTS BELOW,

NONDUS TASSEN, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF BILLY L. TASSEN,

APPELLEES/THIRD PARTY PLAINTIFF BELOW,

V.

OLD COLONY COMPANY AND BETTY P. SARGENT,

APPELLEES/THIRD PARTY DEFENDANTS BELOW.

BRIEF OF APPELLANT

RICHARD J. BOLEN - WV STATE BAR ID NO. 392
HUDDLESTON BOLEN LLP
611 THIRD AVENUE
P.O. BOX 2185
HUNTINGTON, WV 25722-2185
PHONE: (304) 529-6181
FACSIMILE: (304) 522-4312

COUNSEL FOR APPELLANT
CHOICE LANDS, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

On this appeal, Appellant, Choice Lands, LLC, a West Virginia limited liability company ("Choice Lands"), asks this Court to reverse the judgment on the pleadings entered by the Circuit Court of Cabell County in favor of Kenneth Jones and Joyce Jones (collectively, the "Joneses").

The dispute from which this action arises involves the Joneses' use of an existing gravel driveway. The driveway runs from Bonnie Boulevard, a public street in Huntington, to the back of the Joneses' property and beyond. The Joneses have a recorded easement for access to the rear of their property, either from Bonnie Boulevard located west of their property, or from Norway Avenue, located north of their property. The Joneses were deeded this easement, indirectly, from Appellee Nondus Tassen ("Mrs. Tassen") and her late husband.

The Joneses' claim that the existing gravel driveway ("gravel driveway"), which they have purportedly used for many years, is the easement they were promised in their deed. The deed, however, does not specify the location of the easement, although it does limit the easement to Lots 10, 11, 12, 14, or some combination thereof. Importantly, the Joneses were not granted an easement as to Lot 13, but the gravel driveway crosses Lot 13. The Joneses cannot gain access to their property

over the gravel driveway without crossing Lot 13, as to which they have no easement.

Because the Joneses have allegedly used the gravel driveway for many years, including the portion that crosses Lot 13, they claim the right to use Lot 13. Although never well articulated, the Joneses, in effect, are claiming a prescriptive easement as to Lot 13. Judge Pancake has, without hearing evidence, endorsed this claim and concluded that the Lot 13 portion of the gravel driveway has become "a part of the easement due to its 27 years of continuous use." *See* 2007 Order at Conclusions of Law, ¶ 4.

The Joneses' claim of prescriptive easement as to Lot 13 and Judge Pancake's endorsement of that claim ignore one of the most fundamental principles of West Virginia property law - no amount of continuous use can create a prescriptive easement if the use is by permission of the owner. Only adverse use can create a prescriptive easement.

In this case, the Joneses used the Lot 13 portion of the gravel driveway only with the permission of the Appellee Mrs. Tassen and her late husband who, until very recently, owned that portion of Lot 13. When the Tassens sold that portion of Lot 13 to Choice Lands, they went to the Joneses, prior to the sale, and specifically terminated the permission to use the subject gravel driveway.

At that moment in time, the Joneses ceased to have any right to use the Lot 13 portion of the gravel driveway.[1] The Circuit Court of Cabell County clearly erred in holding to the contrary.

On this appeal, Appellant asks the Court to reverse the judgment on the pleadings entered in favor of the Joneses by the Circuit Court of Cabell County and remand the case to allow discovery.

In order to understand the issues presented, it is important to understand the "lay of the land." Accordingly, Choice Lands submitted to the circuit court a survey showing the property, lots, gravel driveway, and other property features involved in this case as an exhibit to its motion for reconsideration.[2] Choice Lands includes a reduced version of the survey herein for this Court's convenience:

---

[1] In fact, the Joneses ceased to have any right to use any portion of the gravel driveway, because without the Lot 13 portion thereof, the gravel driveway does not provide access from either Bonnie Boulevard or Norway Avenue to the rear of the Joneses' residence.

[2] A full size copy of the survey was attached to the Petition for Appeal with the Affidavit of the surveyor, Jeffrey Eastham, as "Exhibit A," and the survey and affidavit are also attached hereto and made a part herein collectively as "Exhibit A."

WEST VIRGINIA
CABELL COUNTY
GUYANDOTTE DISTRICT
REVISED PLAT NO. 1
CAMPBELL PLACE
M.B. 3, PG. 46

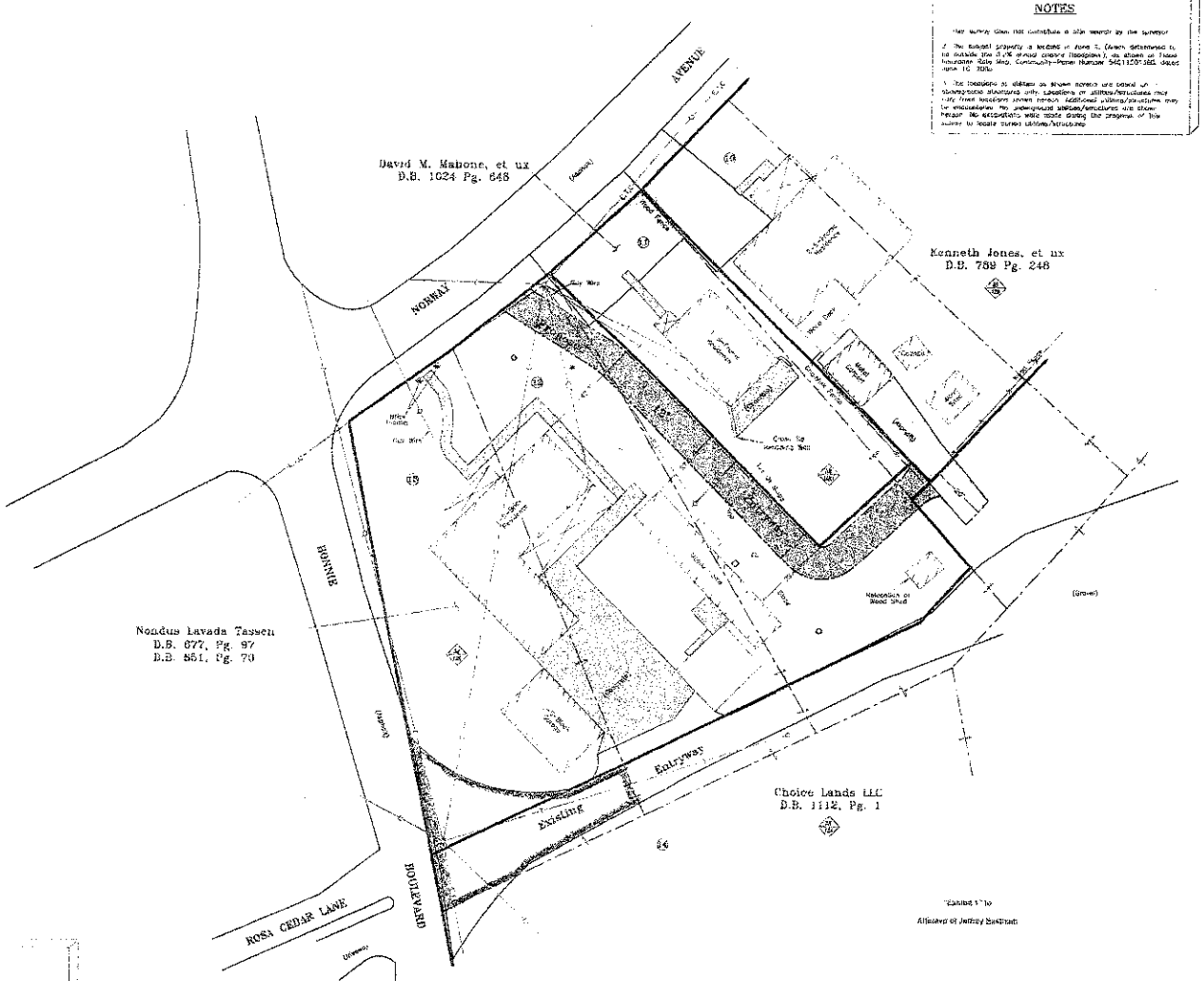
Survey shown is based on a survey plat prepared by Michael D. Parker, WV PS 384, dated August 6, 2003 and recorded in D.B. 1112, Pg. 1

NOTES

1. This survey does not constitute a title search by the surveyor.

2. The subject property is located in Zone X, (Areas determined to be outside the 0.2% annual chance floodplain), as shown on Flood Insurance Rate Map, Community-Panel Number 540150 0001 dated June 16, 2006.

3. No boundary or utilities as shown hereon are based on monumented boundaries with locations or utilities/structures marked by those locations shown hereon. Additional utilities/structures may be encountered. No underground utilities/structures were shown hereon. No excavations were made during the progress of this survey to locate buried utilities/structures.



LEGEND

- Utility Pole
- Set Stainless Steel Pin
- Decorative Pole
- 24" Dia Oak
- 30" Maple
- Property Line
- Deeded Lot Line
- Adjoining Tract Line
- Overhead Electric, Telephone and Cable Lines
- Regular Lot Number
- Tax Map Number
- Tax Parcel Number

0' 20' 40' 80'

DATE	DESCRIPTION	NO.
1/30/06	Revised Proposed Entryway	1

REVISIONS

PROJECT

Access Exhibit
Norway Avenue &
Bonnie Boulevard
Huntington, WV

DRAWING TITLE

Access Exhibit
for
Huddleston Bolen, LLP

JOB NO. 5875 WC	DRAWING NO.
DATE : January 6, 2006	5875-2 WC
SCALE : 1" = 20'	
DRN. BY : J. D. Leadingham	
CHKD. BY : J. M. Eastham	SHEET 2 OF 2

SURVEYOR'S CERTIFICATE

The undersigned is duly surveyor licensed to practice in the State of West Virginia hereby certifies that the attached plat, and the survey it depicts, were executed by me, or under my direct supervision, and that the same is true and correct to the best of my knowledge and belief.

Jeffrey M. Eastham
Licensed Surveyor No. 2067

JEFFREY M. EASTHAM
No. 2067
STATE OF
WEST VIRGINIA
LICENSED
PROFESSIONAL SURVEYOR

The portion of the existing driveway which crosses Lot 13.

Eastham & Associates
ENGINEERS - SURVEYORS - PLANNERS
• 3992 STATE ROUTE 7, • CHESAPEAKE, OH 45619 •
• (740) 867-8369 • (800) 424-5258 • Fax (740) 867-8146 •
• E-mail Address • eastham@eastham-assoc.com •
• http://www.eastham-assoc.com •

The foregoing survey shows the gravel driveway at issue marked as the "Existing Entryway." For convenience, Appellant has outlined in pink the portion of the gravel driveway that crosses Lot 13. The gravel driveway cannot be used to reach Bonnie Boulevard without crossing Lot 13, a portion of which is now owned by Choice Lands, and which is not encumbered by any written easement. The survey also contains a "Proposed Entryway," which could be used by the Joneses to access their property and which would be entirely within the scope of the written easement, unlike the gravel driveway.

II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE CIRCUIT COURT OF CABELL COUNTY

Appellant Choice Lands brought this action against the Joneses and Mrs. Tassen to resolve the dispute over the use of the gravel driveway outlined above.

Choice Lands is seeking, among other things, to have the court declare that the easement claimed by the Joneses was not specifically located by the deed that created it and, in any event, that the Joneses have never had a written easement over any portion of Lot 13, which is the lot across which the gravel driveway connects to Bonnie Boulevard. Under no viable theory do the Joneses have a right to use the Lot 13 portion of the gravel driveway.

After the action was filed, Mrs. Tassen asserted third party claims against the realtor involved in the transaction, Betty Sargent, and Old Colony Company.

Shortly after the filing of the initial pleadings, the Joneses moved the court for judgment on the pleadings under Rule 12(c) of the West Virginia Rules of Civil Procedure. On April 26, 2006, Judge Pancake heard oral argument, but took no evidence. By order dated July 20, 2006, Judge Pancake erroneously granted judgment on the pleadings in favor of the Joneses.

Appellant moved for reconsideration of the July 20, 2006 order. Appellant's motion for reconsideration was denied by the court in an order entered May 14, 2007.[3] Judge Pancake held that "the [May 14, 2007] ruling and order are inextricably intertwined with the July 20, 2006 Order, and, for legal and equitable reasons, this Court considers that the appeal time for both orders should run concurrently from the entry of this order." The court further held in the May 14, 2007 order that "the court does not believe that the Plaintiff's appeal time should begin to run for either order until entry of this order. The present order constitutes a modification of or amendment to the July 20, 2006 Order."

[3] A copy of the May 14, 2007 order was attached to the Docketing Statement accompanying the Petition for Appeal.

Thus, it is from the May 14, 2007 order (hereinafter referred to as the "2007 Order") denying Appellant's motion to reconsider and modifying and amending the July 20, 2006 order (hereinafter referred to as the "2006 Order") granting judgment on the pleadings in favor of the Joneses that are the subject of this appeal. Appellant seeks to have the orders reversed and vacated in their entirety and to have the case remanded for discovery and further proceedings.

III. STATEMENT OF FACTS

The present litigation arises from a real estate transaction between the sellers, Billy L. Tassen[4] and his wife, Nondus Tassen, and the purchaser, Choice Lands. On August 13, 2003, Choice Lands purchased a 6.53 acre (more or less) parcel of land in the Guyandotte District of Cabell County (hereinafter the "Property") from the Tassens. *See* Complaint at ¶ 5 and Exhibit B, Affidavit of Bruce Johnson[5], at ¶ 2.

At and prior to the closing, the Tassens told Choice Lands that an approximately twenty foot wide graveled area across the Property had been utilized by both the Tassens and the Joneses as a driveway to their respective residences in the past.

---

[4] Mr. Tassen was living at the time of the transaction but died on April 20, 2005; his wife is the executrix of his estate.

[5] The Affidavit of Bruce Johnson is part of the record below and was attached to *Plaintiff's Motion for Reconsideration of Order Granting Jones Defendants' Motion for Judgment on the Pleadings or, in the Alternative, Motion for Relief from that Order*. A copy of the Affidavit of Bruce Johnson was attached

However, the Tassens represented that the Joneses' use of the gravel driveway was merely permissive and had been or would be terminated by the Tassens prior to closing. *See* Complaint at ¶ 7 and Exhibit B, Affidavit of Bruce Johnson, at ¶¶ 3-4.

Based on these representations, Bruce Johnson, the manager of Choice Lands, accompanied Billy L. Tassen to the Joneses' home for a meeting with Kenneth Jones to terminate the use of the gravel driveway prior to the closing of the sale/purchase of the Property. *See* Exhibit B, Affidavit of Bruce Johnson, at ¶¶ 5-6. At that meeting, Billy L. Tassen told Kenneth Jones that the Joneses' permissive use of the gravel driveway was being terminated due to the sale/purchase of the Property, including the gravel driveway, to Choice Lands. *See* Complaint at ¶ 7 and Exhibit B, Affidavit of Bruce Johnson, at ¶ 7. Mr. Jones at no time during the meeting or prior to closing made any substantive response at all to this characterization of the permissive nature of the use of the gravel driveway or to the termination thereof by Mr. Tassen, despite being given full and fair opportunity to do so at the meeting; Mr. Jones made no assertion whatsoever of any right by express easement, or otherwise, in the gravel driveway. *See* Exhibit B, Affidavit of Bruce Johnson, at ¶¶ 8-9.

---

as "Exhibit B" to the Petition for Appeal and is also attached hereto as "Exhibit B.".

It was only after the closing that the Joneses claimed, for the first time, that their use of the gravel driveway for ingress and egress was not merely permissive, but was the result of an easement by deed granted by the Tassens to the previous owners of the Joneses' property and later transferred by deed to the Joneses upon their purchase of their property. The Joneses' claim for ingress and egress is based solely upon the following deed language:

> "TOGETHER with the right of ingress and egress with automobiles unto the southerly part of the above described parcel over and across any easement or right-of-way being used for vehicles or usable for vehicles extending from Norway Avenue or Bonnie Boulevard across or on Lot 10 and/or Lot 11 and/or Lot 12 and/or Lot 14 of said Campbell Place;"

See the Deeds attached as Exhibit C and Exhibit D, respectively, to the Complaint. This language clearly shows that the right of ingress and egress granted to the Joneses was *not* specifically identified or located on the ground; it was intentionally left open as to whether access might be created from Norway Avenue on the north or Bonnie Boulevard on the west. However, the easement grant is specific in one respect - it does not allow the easement to cross Lot 13.

Choice Lands takes no position as to the alleged right of the Joneses to insist that the Tassens provide them a right-of-way; however, the above-cited deed language does not grant a

specifically located easement; it only specifies that if an easement is "being used" or is "usable" from either Norway Avenue or Bonnie Boulevard across Lot 10, 11, 12, 14, or some combination thereof, then the Joneses have a right to use it. Accordingly, any right-of-way to which the Joneses may be entitled by virtue of their deed must be located on the Tassens' reserved property, consistent with both the representations the Tassens made to Choice Lands at the time they sold Choice Lands the Property and the scope of the easement granted to the Joneses' predecessors in title.[6]

IV. ASSIGNMENTS OF ERROR

THE TRIAL COURT ERRED IN GRANTING THE JONESES' MOTION FOR JUDGMENT ON THE PLEADINGS, AND ERRED IN (1) PREMATURELY MAKING FINDINGS OF FACT THAT ARE CONTRARY TO APPELLANT'S ALLEGATIONS AND WITHOUT BASIS IN THE RECORD, AND (2) DRAWING CONCLUSIONS OF LAW WHICH ARE CONTRARY TO THE WELL-SETTLED LAW OF WEST VIRGINIA.

V. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

A. THE CIRCUIT COURT ERRED IN GRANTING THE JONESES' MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE COURT MISAPPLIED THE VERY RESTRICTIVE STANDARD FOR GRANTING SUCH A MOTION.

The Joneses' motion for judgment on the pleadings was submitted pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure, which provides:

---

[6] Appellant has made repeated attempts to work with the Tassens and the Joneses to solve this dispute, and both the Tassens and the Joneses have at various times expressed willingness to relocate the driveway. As shown on the attached survey, it would be quite possible for Mrs. Tassen to provide the Joneses an entryway over Lots 10, 11, and 12.

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

In order for a circuit court to enter judgment on the pleadings under Rule 12(c), the court must be satisfied that "viewing *all the facts in a light most favorable to the nonmoving party* ... it appears *beyond doubt* that the nonmoving party can prove *no set of facts* in support of his or her claim or defense." Copley v. Mingo County Board of Education, 466 S.E.2d 139, 143 (W. Va. 1995)(emphasis added). A motion for judgment on the pleadings does not test the proof of the facts alleged, but rather *assumes the truth* of those facts most favorable to the nonmoving party and "presents a challenge to the legal effect of [those] given facts." Id.

When the defendant is the moving party for judgment on the pleadings, the court must "read a pleading liberally and accept as true the well-pleaded allegations of the complaint and the inferences that reasonably may be drawn from the allegations." Kopelman & Associates, L.C., v. Collins, 473 S.E.2d 910, 914 (W. Va. 1996). Further, as in an analogous Rule 12(b) motion, "a defendant may not succeed on [such a motion] if there are

allegations in the pleadings which, if proved, will provide a basis for recovery." Id. For these reasons, "courts generally adhere to a rather restrictive standard in ruling on motions for judgment on the pleadings under Rule 12(c)." Copley, 466 S.E.2d at 143 (quoting Calvert Fire Insurance Co. v. Bauer, 332 S.E.2d 586, 588 (W. Va. 1985)). Finally, a "motion will not be granted except when it is apparent that the deficiency could not be cured by an amendment." Syllabus Pt. 2, Copley.

The Supreme Court of Appeals has clearly indicated a preference for adjudicating cases on their merits, and Judge Pancake's 2007 Order is contrary to this policy. Although Choice Lands maintains that the pleadings in their current form are sufficient to survive such a motion, even if the circuit court found the pleadings lacking, Syllabus Point 2 of Copley requires the court to make a finding that it is "apparent" that any deficiency in the pleadings "could not be cured by an amendment." Id.

The circuit court should have taken the Choice Lands' allegations and unchallenged affidavits as true, and should have drawn such inferences from those allegations as are reasonable under the circumstances.

In the present case, Choice Lands has offered the deed language, which indisputably demonstrates that no written easement was granted regarding Lot 13. Choice Lands has also

offered a survey that shows that the gravel driveway exceeds the scope of the written easement because it crosses Lot 13. Choice Lands has alleged that the use of the gravel driveway, which exceeds the scope of the written easement, was purely permissive in nature and that the Joneses are estopped from denying the permissive nature of the easement because of their statements and conduct prior to closing. The allegations with respect to Mr. Tassen's termination of permission for the Joneses to use the gravel driveway, the estoppel argument applicable to the Joneses, and the necessary inferences to be derived therefrom, present a set of facts on which a judgment for Choice Lands could be based, and this was more than sufficient to defeat the Joneses' motion for judgment on the pleadings. Finally, any deficiency in the pleadings should have been permitted to be cured by amendment, if needed.

The 2007 Order makes it apparent that the circuit court did not apply the liberal standard required by the Supreme Court of Appeals to the Joneses' motion for judgment on the pleadings, and failed to consider the facts and all the reasonable inferences to be derived therefrom in the light most favorable to Choice Lands. As a result, Choice Lands has been prevented from engaging in discovery which, the Appellant asserts, will support the claims against the Appellees.

In order to bolster his orders granting judgment on the pleadings in favor of the Joneses, Judge Pancake made several "findings of fact" based solely on unverified pleadings and unsworn oral statements of counsel - facts that are contrary to the allegations set forth by Choice Lands in its Complaint and that are contrary to the undisputed evidence (in the form of sworn affidavits) that was placed on the record by Choice Lands. This mandates reversal of the order granting judgment on the pleadings in favor of the Joneses, because a motion for judgment on the pleadings does not test the proof of the facts alleged, but rather *assumes the truth* of those facts most favorable to the nonmoving party. Copley v. Mingo County Board of Education, 466 S.E.2d 139, 143 (W. Va. 1995). Judge Pancake clearly did not assume as true the facts most favorable to Choice Lands, but instead improperly made his own contrary findings of fact, which have no support in the pleadings or in the record.

B. THE CIRCUIT COURT ERRED IN MAKING "FINDINGS OF FACT" BASED ON UNSWORN PLEADINGS AND ORAL ARGUMENT, AND SOME OF THESE MATERIAL "FACTS" ARE PLAINLY WRONG.

In the 2007 Order granting judgment on the pleadings, the Trial Court made "Findings of Fact" which it said were "based upon the pleadings, exhibits, and oral and written argument of counsel for the parties…." There were no stipulations, no depositions, no evidentiary hearings, no production of documents, no affidavits other than the two affidavits submitted

by Choice Lands, and there were no counter affidavits and no verified pleadings. In short, the Findings of Fact were based on unverified pleadings and arguments of Appellees' counsel. Predictably, such findings, made without the protection of any oath to tell the truth and without any cross-examination may or may not be correct and cannot possibly form an adequate basis for dismissing an otherwise viable claim.

It is well-established in the law of West Virginia that circuit courts cannot make alleged "findings of fact" based on unsworn oral statements, whether included in a transcript of a hearing or not. *See, e.g.*, Syllabus Point 4, Boggs v. Settle, 145 S.E.2d 446 (W. Va. 1965):

> "This court, in the exercise of its appellate jurisdiction, will reverse a finding of fact made by a trial court if it appears that such finding of fact is not supported by competent evidence."

In Boggs, this Court stated as follows:

> "It appears, inferentially at least, that the trial court's factual determination was made in whole or in part, upon oral statements made by counsel in open court, addressed in some instances to the court and in other instances to opposing counsel. While at least some of such oral statements of counsel are before us as a part of the court reporter's transcript of the trial court's proceedings, it appears that counsel for the parties appeared before the trial court on one or more occasions when the proceedings were not recorded by the court reporter. We are of the opinion that such unsworn oral statements, even if included in a transcript of the proceedings, cannot form the basis of a finding of fact to which the usual attributes of a finding of fact can be attached upon a review by an appellate court.

> This court, in innumerable cases, has been called upon to appraise findings of fact, including findings made by juries, by trial chancellors and by judges of trial courts sitting in lieu of juries. We are not aware of any such case, and our attention has not been directed to any such case, in which the finding of fact was made in the absence of that which is regarded in law as competent proof or evidence." 145 S.E.2d 446, 451.

Several of the material "facts" found by the Trial Court based on oral argument are either questionable or plainly wrong:

1. **THE CIRCUIT COURT'S FINDING OF CONTINUOUS USE OF THE GRAVEL DRIVEWAY FOR TWENTY-SEVEN (27) YEARS BY THE JONESES MAY OR MAY NOT BE TRUE.**

It appears to be true that the Joneses have owned their property for twenty-seven (27) years, but there is simply no evidence in the record to establish that the Joneses have continuously used the gravel driveway during that time period. The Joneses' property faces on Norway Avenue, and it is entirely possible that the Joneses simply parked in front of their house or never owned a car, and, in either case, never used the gravel driveway to access the rear of their house. Without cross-examination of the Joneses, we will never know whether the Court's assumption that the Joneses have used the gravel driveway continuously for twenty-seven (27) years was or was not correct.

2. **THE CIRCUIT COURT'S FINDING THAT "LOT 13 WAS OWNED BY THE TASSENS, WHO DID NOT OBJECT TO THE JONESES' MOTION FOR JUDGMENT ON THE PLEADINGS..." IS PLAINLY WRONG.**

Although it is true that at one time the Tassens owned all of Lot 13, they sold the only portion of Lot 13 which is material to this action, i.e., the portion of Lot 13 over which the gravel driveway passes, to Choice Lands. Choice Lands owns the portion of Lot 13 at issue, and Choice Lands does strongly object to the Joneses' use of Lot 13 and to their motion for judgment on the pleadings.

Of course, Mrs. Tassen does not object to allowing the Joneses to continue to use the gravel driveway which is located almost entirely on Choice Lands' Property. Mrs. Tassen is likely well aware that if the Joneses are prevented from using the gravel driveway then she, Mrs. Tassen, might be obligated to provide the Joneses an alternate entryway over Lots 10, 11, 12, and/or 14 as set forth in the easement she and her husband granted to the Joneses' predecessor. No, Mrs. Tassen doesn't object to the judgment on the pleadings allowing the Joneses to use a portion of Lot 13 -- because, contrary to the Court's finding, she does not own that portion of Lot 13.

3. THE CIRCUIT COURT'S FINDING THAT A "REASONABLE INSPECTION OF THE PROPERTY WOULD HAVE DISCLOSED (THE) EASEMENT PRIOR TO THE PURCHASE" IS PLAINLY WRONG.

Although an inspection of the Property would have very quickly disclosed the location of the gravel driveway, no amount of inspection would have disclosed the existence of an easement

for access over Lots 10, 11, 12, or 14, because it doesn't exist.

Prior to the closing of the sale of the Property, Choice Lands did inspect the Property. Choice Lands also noted the presence of the gravel driveway over the Property. Choice Lands made diligent inquiry regarding the gravel driveway. Mr. Tassen represented to Bruce Johnson, Manager of Choice Lands, that the Joneses' use of the gravel driveway was merely permissive and that the Joneses did not have a legal right, by way of an easement or otherwise, to the continued use of the gravel driveway. *See* Exhibit B, Affidavit of Bruce Johnson, at ¶ 3. There is presently no evidence on the record to dispute Mr. Tassen's representations. This is because the only written easement that exists in the recorded chain of title permits the use of Lots 10, 11, 12, 14, or some combination thereof. The gravel driveway cannot be used to access the Joneses' residence from Bonnie Boulevard without traversing the portion of Lot 13 now owned by Choice Lands; yet, there is no evidence that the Joneses were ever granted a written easement permitting the use of any portion of Lot 13.

A reasonable inspection also would *not* have disclosed, and did not disclose, the existence of any easement by prescription. Choice Lands made diligent efforts to ensure that the Joneses' purported past use of the gravel driveway occurred with the

permission of the Tassens, since permissive use would not support a claim of easement by prescription. Mr. Johnson of Choice Lands requested to be present and was present when Mr. Tassen informed Mr. Jones that the permissive use of the gravel driveway was being terminated because the Property was being sold to Choice Lands. *See* Exhibit B, Affidavit of Bruce Johnson, at ¶¶ 4-8.

The circuit court's finding that a "reasonable inspection" of the Property would have disclosed the existence of the easement is flawed because: (1) it assumes that an easement exists regarding the gravel driveway, and there is no such easement; (2) it ignores the facts alleged and affidavit submitted by Choice Lands to support the contention that a reasonable inspection and diligent inquiry were, in fact, made; and (3) it ignores the representations and failure to speak of Mr. Tassen and Mr. Jones, respectively.

C. THE CIRCUIT COURT ERRED IN FINDING THAT THE ALLEGED EASEMENT IN QUESTION EXISTS IN THE JONESES' RECORD CHAIN OF TITLE.

In granting judgment in favor of the Joneses, Judge Pancake found:

> "That the pleadings filed in this matter clearly showed that the easement in question had existed in defendants Kenneth and Joyce Jones chain of title of record in the Cabell County Clerk's Office since November 16th, 1973, and that defendants Kenneth and Joyce Jones have owned their property, with the easement in question contained in their chain of

> title, since June 12th, 1978." 2006 Order at Findings of Fact ¶ 3. *See also* 2007 Order at Findings of Fact ¶ 2.

This finding of fact is clearly wrong. There is no written easement in the Joneses' chain of title that would encompass the gravel driveway. The written easement upon which the Joneses rely permits ingress and egress from either Norway Avenue or Bonnie Boulevard across any combination of Lots 10, 11, 12, or 14. The gravel driveway is clearly outside the scope of this written easement because the gravel driveway extends across Lot 13. The Property that Choice Lands purchased from the Tassens includes the portion of Lot 13 which connects the gravel driveway from Lot 12 to Bonnie Boulevard. *Without Lot 13, which is not now and has never been encumbered by a written easement, the Joneses cannot reach Bonnie Boulevard from their property by way of the gravel driveway.* Accordingly, Judge Pancake's finding that the Lot 13 portion of the gravel driveway in question is included in the Joneses' record chain of title is patently wrong.

Based on the title records and survey proffered by Choice Lands, it is clear that the Joneses do *not* have a written easement that encompasses the gravel driveway. In fact, if this matter had been at a procedural stage where dispositive judgment was proper, Choice Lands submits that judgment would have been most appropriate in its favor since the only evidence of record

clearly establishes that the gravel driveway exceeds the scope of the easement upon which the Joneses rely. The gravel driveway cannot be used to access Bonnie Boulevard without crossing the portion of Lot 13 now owned by Choice Lands, which is not and has never been encumbered by any easement of record.

D. THE CIRCUIT COURT ERRED IN FINDING THAT THE PERMISSIVE USE OF THE LOT 13 PORTION OF THE GRAVEL DRIVEWAY ESTABLISHED LOT 13 AS PART OF THE WRITTEN EASEMENT OR OTHERWISE CREATED AN EASEMENT.

In the 2007 Order, Judge Pancake rejected Choice Lands' argument that there is no written easement over Lot 13 as irrelevant and stated:

> "Lot 13 was owned by the Tassens, who did not object to the Joneses motion for judgment on the pleadings and who stated that the easement was specific. The Tassens had always allowed the Joneses to cross lot 13, at least prior to Mr. Tassen's termination of any such permissive use, thus establishing it as a part of the easement due to its 27 years of continuous use." 2007 Order at Conclusions of Law ¶ 4.

The notion that a written easement can be expanded by permissive use of areas outside the written easement so as to bind subsequent purchasers is contrary to the most basic tenets of property law. Written express easements of record are intended to put purchasers on notice of the scope of the easement. *The written easement upon which the Joneses rely plainly does not include Lot 13*. During the period that they owned the property, the Tassens could certainly grant, and apparently did grant, their express permission for the Joneses

to use the Lot 13 portion of the gravel driveway, but that express permission simply cannot change or expand the written easement. *See* Syllabus Point 5 of Grist Lumber, Inc. v. Brown, 550 S.E.2d 66 (W. Va. 2001):

> "'To establish an easement by prescription there must be continuous and uninterrupted use or enjoyment for at least ten years, identity of the thing enjoyed, and a claim of right adverse to the owner of the land, known to and acquiesced in by him; ***but if the use is by permission of the owner, an easement is not created by such use***.' Syl.Pt.1, Town of Paden City v. Felton, 136 W.Va. 127, 66 S.E.2d 280 (1951)." (emphasis added).

See also Syllabus Point 4 of Carr et al. v. Constable, 470 S.E.2d 408 (W. Va. 1996):

> "'If the use is by permission of the owner, an easement is not created by such use.' Syl.Pt. 1, in part, Town of Paden City v. Felton, 136 W.Va. 127, 66 S.E.2d 280 (1951)."

See also Syllabus Point 3 in Jamison, et al. v. The Waldeck United Methodist Church, et al., 445 S.E.2d 229 (W. Va. 1994).

In the Grist Lumber case supra, the facts and decision of the trial court were similar to the facts and trial court decision in the case at bar. For decades, Grist's predecessor had used the road on the landowner's property when it belonged to his predecessors as the sole means of accessing their property. For two two-year periods, the landowner's predecessor allowed Grist's predecessor to use the road to haul timber. After the landowner bought the property, he forbade Grist from

using the road and Grist sued to establish its right to a prescriptive easement. The trial court granted the company an easement that could be used for timbering and set the dimensions of the easement. The landowner appealed.

This Court, on appeal, held that while the undisputed evidence showed Grist's entitlement to an easement for ingress and egress, the trial court erred in expanding the easement's purpose to include timbering. There was, apparently, no evidence of use of the road for timbering for any ten-year prescriptive period. Further, what timber hauling did occur was with permission of the prior owner and permissive use would not support a claim to a prescriptive easement. This court found that the trial court had erred in expanding the easement based on permissive use.

It is submitted that that is exactly what Judge Pancake has done in the case at bar - attempted to expand an easement beyond its scope based on permissive use. The well-settled law of West Virginia does not permit that. Prescriptive easements can only be obtained through "a claim of right adverse to the owner of the land" and where the use is by permission of the owner it is not adverse to the owner of the land. The Joneses' use of the portion of the gravel driveway crossing Lot 13 became adverse for the first time when Mr. Tassen informed Mr. Jones that the

permission to use the gravel driveway was being terminated, and that occurred much less than ten years ago.

Judge Pancake found that express permission was granted for the use of the gravel driveway, and that the permission was terminated by the Tassens prior to the sale of the Property to Choice Lands. It is difficult to understand how Judge Pancake concluded from these (presumed) facts that the portion of the gravel driveway crossing Lot 13 (which is unencumbered by a written easement) became part of the easement due to its 27 years of alleged (but as of now unproven) continuous use. Clearly, Judge Pancake could not conclude at this stage that a prescriptive easement was established based on continuous, adverse use, because Judge Pancake has already purported to find that the Joneses had express permission to use the gravel driveway across Lot 13, and express permission is a bar to establishing a prescriptive easement. There is simply no basis in law or in fact for Judge Pancake's finding.

E. THE CIRCUIT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS AND SUMMARILY REJECTING APPELLANT'S ESTOPPEL ARGUMENT; THE CIRCUIT COURT REACHED THIS CONCLUSION BASED ON PRESUMED FACTS THAT ARE CONTRARY TO THE FACTS ALLEGED BY APPELLANT AND THE EVIDENCE PROFFERED BY APPELLANT.

Judge Pancake summarily rejected Choice Lands' argument that the Joneses were estopped to claim a right to use the gravel driveway based on their failure to object when Mr. Tassen

terminated their permissive use of the gravel driveway.[7] Judge Pancake concluded that "Instead of relying on Mr. Jones' silence, the Court concludes that the Plaintiff had a duty to investigate the easement in question; the Plaintiff may not maintain an estoppel argument based upon Mr. Jones' silence when *a reasonable inspection of the property would have disclosed the easement prior to the purchase*." 2007 Order at Conclusions of Law ¶ 7 (emphasis added).

However, Choice Lands has alleged that it did perform a reasonable investigation and inspection of the Property prior to purchase, had knowledge of the gravel driveway, was informed that the use of the gravel driveway by the Joneses was based strictly on permission from the Tassens, and that the permission would be terminated. Bruce Johnson, manager of Choice Lands,

---

[7] "The Plaintiff next argues that it reasonably relied upon the failure of Kenneth Jones to object to Billy L. Tassen's representation, made to the Plaintiff in Mr. Jones' presence, that the Joneses' use of the gravel driveway was merely permissive and that Mr. Tassen effectively terminated such permissive use prior to the consummation of the sale of the property to the Plaintiff. The Plaintiff asserts that Kenneth Jones' failure to object to Mr. Tassen's representations about the use of the driveway created detrimental reliance and that the Joneses should, therefore, be estopped from denying these representations after the transaction." 2007 Order at Finding of Fact ¶ 6.

"The Court concludes that the Plaintiff's estoppel argument also fails. The Plaintiff claims that Mr. Jones' silence at the meeting with Mr. Billy Tassen and Bruce Johnson, in which Mr. Tassen allegedly told Mr. Jones that the easement was being terminated, caused the Plaintiff to detrimentally rely on this silence and to go forward with the purchase of the property under the assumption that the easement had been terminated. Instead of relying on Mr. Jones' silence, the Court concludes that the Plaintiff had a duty to investigate the easement in question; *the Plaintiff may not maintain an estoppel argument based upon Mr. Jones' silence when a reasonable inspection of the property would have disclosed the easement prior to the purchase*." 2007 Order at Conclusions of Law ¶ 7 (emphasis added).

then accompanied Mr. Tassen to the Joneses' residence so that he could witness the termination of the permissive use. *See* Complaint at ¶¶ 6, 7, 13, 14 and Exhibit B, Affidavit of Bruce Johnson, at ¶¶ 4, 5, 6, 7, 8. As noted above, a reasonable inspection would have disclosed and did disclose the presence of the gravel driveway but not the easement, because no written easement existed that encompassed the gravel driveway.

The circuit court rejected Choice Lands' estoppel argument based solely on the circuit court's conclusion that Choice Lands failed to reasonably inspect the Property prior to purchase and failed to discover the presence of the gravel driveway. This conclusion has absolutely no basis in fact or in the record and is blatantly contrary to the well-pled allegations of Choice Lands' Complaint, as substantiated by affidavits placed of record by Choice Lands in this matter.

It is well-settled in West Virginia, as in most jurisdictions, that actions taken in reasonable reliance upon the representations of others who have reason to know that a party will likely rely on such representations will estop the party that made the representations and/or encouraged the reliance from denying the truth thereof as against the relying party. *See* Ara v. Erie Ins. Co., 387 S.E.2d 320 (W. Va. 1989). Estoppel arises not only from express representations, but also from acts or conduct; a party is estopped from denying that

which his conduct has induced others to act upon as true. *See, eg.*, Atkinson v. Plum, 40 S.E. 587 (W. Va. 1901); Pocahontas Light & Water Co. v. Browning, 44 S.E. 267 (W. Va. 1903). Estoppel may even arise from silence or acquiescence, where such conduct (or lack thereof) has the effect of misleading a party to his detriment and to the other party's benefit. *See, e.g.*, Watson v. Conrad, 18 S.E. 744 (W. Va. 1893); Bates v. Swiger, 21 S.E 874 (W. Va. 1895).

Choice Lands reasonably relied upon both the representations of Mr. Tassen regarding the permissive nature of the Joneses' use of the gravel driveway and Mr. Jones' acquiescence in Mr. Tassen's statements. Thus, the Joneses are barred by estoppel from claiming any right to use the gravel driveway and Judge Pancake's ruling to the contrary is erroneous.

VI. CONCLUSION AND PRAYER FOR RELIEF

It cannot be maintained that Choice Lands, ***beyond doubt***, cannot prove ***any set of facts*** to support its claims, particularly when the posture of the Joneses' motion for judgment on the pleadings required the circuit court to take the allegations in the light most favorable to Choice Lands and to draw all reasonable assumptions therefrom in favor of Choice Lands. The factual and legal arguments, particularly regarding the fact that there is no written easement regarding the portion

of the gravel driveway located on Lot 13, the bar to a prescriptive easement based on the permissive nature of the prior use, and the equitable estoppel claim against Mr. Jones are clearly sufficient to withstand the test under Copley for judgment on the pleadings. Thus, the circuit court erred in entering judgment for the Joneses and in refusing to grant Choice Lands relief from that order.

Appellant Choice Lands respectfully requests, based upon the record and the foregoing, that this Honorable Court reverse and vacate the circuit court's grant of judgment on the pleadings in favor of the Joneses. Appellant also requests oral argument of this appeal.

Respectfully submitted,

Choice Lands, LLC

By: _____
Of Counsel

Richard J. Bolen - WV State Bar ID No. 392
HUDDLESTON BOLEN LLP
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722-2185
Phone: (304) 529-6181
Facsimile: (304) 522-4312

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHOICE LANDS, LLC, A WEST VIRGINIA LIMITED LIABILITY COMPANY,

APPELLANT/PLAINTIFF BELOW,

V. CASE NO.: 33878

NONDUS TASSEN, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF BILLY L. TASSEN, AND KENNETH JONES AND JOYCE JONES,

APPELLEES/DEFENDANTS BELOW,

NONDUS TASSEN, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF BILLY L. TASSEN,

APPELLEES/THIRD PARTY PLAINTIFF BELOW,

V.

OLD COLONY COMPANY AND BETTY P. SARGENT,

APPELLEES/THIRD PARTY DEFENDANTS BELOW.

CERTIFICATE OF SERVICE

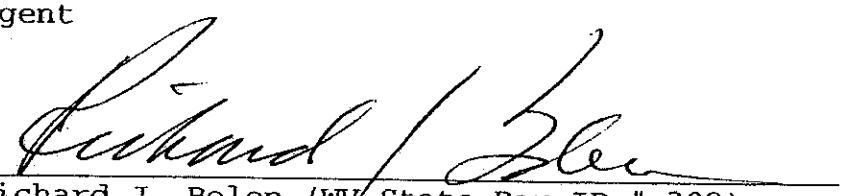
The undersigned attorney hereby certifies that the foregoing **Brief of Appellants** was served upon counsel of record via U.S. Mail, postage prepaid, this 14th day of April, 2008, addressed as follows:

Gail Henderson-Staples, Esq.
Henderson, Henderson
& Staples, L.C.
711½ Fifth Avenue
Huntington, WV 25701

Counsel for Nondus Tassen, individually and
as Executrix of the Estate of Billy L. Tassen

R. Lee Booten II
637 7th Street
Huntington WV 25701
Counsel for Kenneth Jones and Joyce Jones

Christopher L. Hamb
Robinson & McElwee PLLC
P. O. Box 1791
Charleston, WV 25326
Counsel for Old Colony Company of Huntington
and Betty P. Sargent



Richard J. Bolen (WV State Bar ID # 392)
Huddleston Bolen LLP
P.O. Box 2185
Huntington, WV 25722
(304) 529-6181
Counsel for Appellant
Choice Lands, LLC